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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 892

LEHIGH VALLEY COOPERATIVE FARMERS, INC., AND SUNCREST FARMS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

These consolidated cases present important questions as to the validity of certain provisions of the New York-New Jersey Milk Marketing Order (7 C.F.R., Part 927), effective pursuant to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601, *et seq.*). These provisions require certain "handlers" of milk to make payments—generally referred to as "compensatory payments"—to the producer-settlement fund established by the order with regard to milk which is disposed of as fluid milk in the marketing area. The Court of Appeals for the Third Circuit held that the

provisions were authorized by the Act (Pet. 32–41; 287 F. 2d 726).

The Court of Appeals for the Second Circuit had previously held in *Kass* v. *Brannan*, 196 F. 2d 791 (C.A. 2), certiorari denied, 344 U.S. 891, that provisions substantially the same as those involved here were invalid. That court accepted the contention upon which petitioners here primarily rely—that the relevant sections of the order fail to comply with the standards set forth by Section 8c(5) of the Act, 7 U.S.C. 608c(5) (App. 27). However, the same issue is now pending in the Second Circuit again. *Knudsen Brothers Dairy, Inc.* v. *Freeman* (C.A. 2, No. 26,698, argued May 4, 1961).

It is our position that the decision of the Third Circuit in the instant cases is correct. There is at the present time, however, an undeniable conflict between the views of the Second and Third Circuits. Accordingly, we do not now oppose the present petition for a writ of certiorari and we would not oppose it in the event that the Second Circuit should, in the *Knudsen Brothers* case, adhere to the position which it took earlier in the *Kass* case. However, should the Second Circuit repudiate *Kass* in the *Knudsen Brothers* case and agree with the Third Circuit that the contested portions of the order are valid, there would be no further need for review by this Court. We respectfully suggest, therefore, that the Court withhold action on the petition until the beginning of the October Term, 1961, so as to await, for a reasonable time, the Second Circuit's decision in the *Knudsen Brothers* case.

1. (a) The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601, *et seq.*, establishes a system for regulating the marketing of certain agricultural commodities, including milk, insofar as they are in the current of, or affect, interstate or foreign commerce. Its express purpose is to promote and maintain such orderly marketing conditions "as will establish as the prices to farmers, parity prices * * *" and as will avoid unreasonable fluctuations in supplies and prices. 7 U.S.C. 602. But whenever the parity prices are unreasonable with respect to milk in a particular marketing area, in view of the relevant economic factors in that area, the Act directs the fixing of such prices for the marketing area as will reflect the economic factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. 7 U.S.C. 608c(18).[1]

To achieve those purposes, the Act authorizes the Secretary of Agriculture to issue regional marketing orders, each order being specially adapted to the conditions of the area in which it is to be effective. 7 U.S.C. 608c (5), (11). The basic function of the orders is to assure the payment of uniform minimum prices to farmers by "handlers," a term defined as meaning "processors, associations of producers, and others engaged in the handling of * * *" the commodity or product.

[1] This Court has, in the past, noted the unique problems of the milk industry, arising from the intrinsic nature of its product. *Nebbia* v. *New York*, 291 U.S. 502, 516–518; *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 549–550.

Section 8c(5) of the Act, 7 U.S.C. 608c(5) (App. 27), provides that a milk order shall contain one or more of the terms and conditions described therein "and (except as provided in subsection (7)) no others." Subsection (7)(D) (App. 29) authorizes the inclusion of such auxiliary provisions as are "Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)–(7) of this section and necessary to effectuate the other provisions of such order."

Order No. 27 was promulgated by the Secretary of Agriculture in 1938 to regulate the handling of milk in the New York metropolitan marketing area. 3 F.R. 1945, 1957, 2100, 2102. In 1957 the order was amended to extend the marketing area to Northern New Jersey and certain additional areas in New York. 22 F.R. 4643. The plan set out by the order is generally characterized as a market-wide pool and requires the classification, pooling, and pricing of all milk delivered by producers or associations of producers to "pool plants". The pool plants are, in the main, those establishments which handle milk primarily for the marketing area defined in the order.[2]

In recognition of the fact that the value of milk is dependent upon the use made of it, the milk received at the pool plants is classified into three basic categories according to its utilization: Class I (fluid milk), Class II (cream), and Class III (milk prod-

[2] The order provides for the designation as pool plants of such establishments for the receiving, handling, or processing of milk or milk products as meet the requirements specified. 7 C.F.R. 927.25–927.29.

ucts, butter, cheese, etc.).[3] 7 C.F.R. 927.37. Pursuant to the order, the receiving handlers make monthly reports to the Market Administrator as to the quantity of milk purchased by them which falls into each of the use classes. 7 C.F.R. 927.50. The Administrator determines "minimum prices" for the various use classifications and, from these prices, he calculates a "uniform" or "blend" price which is applicable to all the milk received from the producers.[4] This uniform

[3] In *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, in which this Court upheld the constitutionality of the Agricultural Marketing Agreement Act of 1937, the Court also had occasion to consider the scheme of Order No. 27 and to reject several attacks upon its validity. The Court explained thus the reasoning underlying the formulation of the scheme:

"* * * Since all milk produced cannot find a ready market as fluid milk in flush periods, the surplus must move into cream, butter, cheese, milk powder and other more or less non-perishable products. * * * The market for fluid milk for use as a food beverage is the most profitable to the producer. Consequently, all producers strive for the fluid milk market. * * * [C]utthroat competition [among producers] would threaten the quality and in the end the quantity of fluid milk deemed suitable for New York consumption. Students of the problem generally have apparently recognized a fair division among producers of the fluid milk market and utilization of the rest of the available supply in other dairy staples as an appropriate method of attack for its solution. Order No. 27 was an attempt to make effective such an arrangement under the authority of the Agricultural Marketing Agreement Act." 307 U.S. 533, 550.

[4] The formula underlying the blend price has been described as follows:

"The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions

price is the minimum price which each pool plant handler must pay to all his producers. 7 C.F.R. 927.70.

The Market Administrator maintains a fund known as the "Producer Settlement Fund". 7 C.F.R. 927.75. Each handler whose uses place his milk in a high return category must pay into the Producer Settlement Fund the amount by which the use "value" of the milk exceeds the uniform price required to be paid the producers. Each handler whose use "value" of the milk purchased is less than the uniform blend price required to be paid to the producers is entitled to withdraw the amount of the difference from the Producer Settlement Fund. Thus, while every producer receives a uniform minimum price for the milk he sells regardless of the use made of it by the particular handlers who purchased it, the handlers are required to pay varying amounts geared to the uses which they actually make of the milk.

The above-mentioned scheme of the order is, as we have noted, applicable only with respect to milk which has been delivered by "producers" [5] to "pool plants". It is not applicable with respect to milk

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or additions * * *. The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk." *Grant* v. *Benson*, 229 F. 2d 765, 767 (C.A.D.C.), certiorari denied, 350 U.S. 1015.

[5] The word "producer", as used in the order, is a word of art. It refers solely to a farmer whose milk is delivered to a pool plant, and whose milk is therefore subject to the classification, pooling, and pricing provisions of the order. 7 C.F.R. 927.6. A farmer who delivers his milk to a nonpool plant is referred to as a "dairy farmer". 7 C.F.R. 927.5.

which is delivered by "dairy farmers" to "nonpool plants".[6] Accordingly, handlers who operate nonpool plants are not required to pool their milk under the order or to pay minimum prices to the dairy farmers from whom they purchase their milk. However, the order does require nonpool handlers to make "compensatory payments" to the Producer Settlement Fund for any milk which they dispose of as Class I–A milk (*i.e.*, fluid milk) in the marketing area. The amount of the compensatory payment is measured by the difference between the Class I–A price and the Class III price.[7] 7 C.F.R. 927.83, 927.84 (Pet. 26–31). It is the validity of these compensatory payment provisions of the Order which is at issue in this litigation.

(b) Petitioner Lehigh Valley Cooperative Farmers, Inc. and petitioner Suncrest Farms, Inc. operate milk processing plants located, respectively, at Allentown and Bethlehem, Pennsylvania. Both plants distribute milk, in fluid form, in the New York-New Jersey marketing area and are, accordingly, eligible to participate in the marketwide pool as pool plants.[8]

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[6] The "nonpool plants" are those which operate primarily outside the marketing area—*i.e.*, while they may dispose of some milk in the marketing area, they generally handle milk destined for other areas or other uses.

[7] The regulatory justification for the promulgation of the compensatory payment requirement is discussed, *infra*, pp. 12–17.

[8] That is true as to petitioner Suncrest for all of the period involved, from August 1, 1957, to the present. As to petitioner Lehigh, it appears to have been true only since September 1, 1958, when the order was amended to provide for an election. Prior to that time, Lehigh had modified its operations in such a way that it would not qualify as a pool plant (R. 322a–326a; § 927.29(d), R. 831a–832a).

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However, because they sell less than 25% of their production in the market area, they are not required to participate and may elect to be treated as nonpool plants. 7 C.F.R. 927.29(d). Both petitioners have so elected and are thus, for purposes of the order, nonpool plants (R. 87a, 118a; Pet. 35). Accordingly, they are subject to the compensatory payment provisions of the order with respect to the fluid milk which they ship into the New York-New Jersey area.

On August 1, 1957, petitioners filed petitions with the Secretary of Agriculture, pursuant to Section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c(15)(A), alleging that Sections 927.83 and 927.84 of the order (Pet. 26–31), insofar as they required petitioners to make compensatory payments, were not authorized by the Act (R. 9a–23a, 26a–39a). A Hearing Examiner concluded in his recommended decision in both cases, on the authority of *Kass* v. *Brannan,* 196 F. 2d 791 (C.A. 2), certiorari denied, 344 U.S. 891, that the compensatory payment provisions were invalid (R. 42a–57a, 58a–59a). However, the Judicial Officer, acting on behalf of the Secretary, dismissed the petitions, sustaining the validity of the relevant provisions (R. 86a–116a, 117a–141a; Pet. 32).

During the pendency of the administrative proceedings, the United States brought suit against the two petitioners in the United States District Court for the Eastern District of Pennsylvania, pursuant to Section 8a(6) of the Act, 7 U.S.C. 608a(6), to compel them to comply with the order pending final adminis-

trative and judicial disposition of the Section 8c(15) proceedings (R. 165a). The district court entered a temporary injunction directing petitioners to pay the compensatory payments required by the order into the registry of the court until termination of the other proceedings, and retained jurisdiction over the cause (R. 189a–193a).

Following the adverse decisions of the Secretary, each of the petitioners filed in the district court a suit for review of the Secretary's ruling, in accordance with Section 8c(15)(B) of the Act, 7 U.S.C. 608c(15)(B), and the two review actions were consolidated with the pending enforcement action. In the district court, as before, petitioners' basic contention, supported by the authority of *Kass* v. *Brannan*, 196 F. 2d 791 (C.A. 2), certiorari denied, 344 U.S. 891, was that the compensatory payment provisions were invalid in that they violated the "uniformity" requirement in Section 8c(5)(A) of the Act, 7 U.S.C 608c(5)(A) (App. 27). That section provides:

> (5) *Milk and its products; terms and conditions of orders.*
>
> In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk

> purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

In the *Kass* case, the Second Circuit, Judge Learned Hand dissenting, held that, in requiring nonpool handlers to make compensatory payments into the Producer Settlement Fund for fluid milk distributed in the marketing area, Order No. 27 violates the requirement of the above provision of the Act that prices "be uniform as to all handlers." The court viewed the requirement that "minimum prices" be uniform as, in effect, contemplating that the actual *cost* of milk to all handlers distributing milk in the marketing area be the same. It reasoned that, by virtue of the compensatory payment provisions, nonpool handlers would, in most cases, be subjected to a higher cost for their milk than were pool handlers. This followed, said the court, because, while the cost to a pool handler is the class price of the milk, a nonpool handler's cost consists of both the amount it pays the seller and the amount of the compensatory payment. As the amount of the compensatory payment is based on the difference between two class prices, and does not take into account the initial cost to the handler, the court observed that the nonpool handler's total cost is likely to exceed that of the pool handler, a result in violation of Section 8c(5)(A).

The district court in the instant cases held the compensatory payment provisions to be invalid under the authority of the *Kass* case (R. 210a–231a, Pet. 33).[9] On the government's appeal, the Court of Appeals for the Third Circuit reversed, upholding the validity of the challenged provisions (Pet. 32–41). The court declared that the *Kass* decision had erred in construing Section 8c(5)(A) as requiring that all handlers, pool and nonpool, be guaranteed an equal cost for their milk and that, indeed, such a reading "misconceives the plain language of the section" and, in its effects, "directly conflict[s] with the comprehensive regulatory undertaking of the complete Act as conceived by Congress" (Pet. 36, 38). Reasoning that Section 8c(5)(A) necessarily has reference only to pool plants, *i.e.*, fully regulated handlers who must pay uniform prices to their producers and account to the Producer Settlement Fund for their utilization of the milk, the court concluded that the section (Pet. 40):

> * * * provides the foundation upon which the Secretary of Agriculture charges the pool handlers in the marketing area with their actual utilization of the milk despite the fact that under Section 8c(5)(B), they pay the pro-

[9] The district court's judgment decreed that petitioners could withdraw the money which they had paid into the registry of the court, but stayed the execution of this judgment for 21 days (R. 233a). On the government's motion, a further stay, pending appeal, was granted by the court of appeals. The petition indicates that, as of its date, petitioner Lehigh Valley Cooperative Farms, Inc. had paid $577,749.48 and petitioner Suncrest Farms, Inc. had paid $99,862.73 into the registry of the district court (Pet. 6).

> ducer the uniform blend price. It in no way dictates equalized costs between pool handlers or between pool and nonpool handlers. * * * [I]ts only valid construction is that its application is limited to all pool or fully regulated handlers for the regional marketing area to determine the accountability of those handlers to the pool.

Finally, the court ruled that the compensatory payment provisions were authorized by Section 8c(7)(D) of the Act, 7 U.S.C. 608c(7)(D) (App. 29), in that they were "incidental to * * * and necessary to effectuate the other provisions" of the order, and ruled further that the formulation of the provisions was supported by the administrative record (Pet. 41).

2. Petitioners assert that the decision of the Third Circuit in the instant cases is, in basic respects, in conflict with the decision reached by the Second Circuit in the *Kass* case (Pet. 6, 7, 9, 12, 13, 14, 17). We agree.[10] We submit, however, that the court below properly upheld the validity of the compensatory payment provisions of the order, and that the contrary *Kass* decision is based upon a misconception of the purpose of the Act and the regulatory scheme.

(a) In designing the regulatory framework of Order No. 27, the Secretary of Agriculture deemed it essential to formulate a plan of partial regulation with regard to handlers who do only a small part of their

[10] The compensatory payment requirements of the order were, in substance, the same during the time period relevant in the *Kass* case.

business in the marketing area.[11] Without such regulation, nonpool handlers would have a substantial competitive advantage over the fully regulated pool handlers in the sale of fluid milk in the marketing area and the entire regulatory program would be put in serious jeopardy (R. 752a–755a, 216a).

The nonpool handler, unlike the pool handler, is not required by the order to pay minimum prices to his dairy farmers, a factor placing nonpool milk at a competitive advantage over pool milk in the marketing area and thereby aiding nonpool sales to displace pool sales. In addition, the nonpool operator who has a higher ratio of Class I sales than the average in the pool would be able to outbid the pool operator in purchasing milk because he could afford to pay his farmers a price based on his own utilization of the milk. The pool handler obviously could not afford to pay a high utilization price to his producers for milk, and at the same time meet his obligation to make payments into the Producer Settlement Fund for the benefit of all producers. As nonpool fluid milk sales in the marketing area displace sales that otherwise would have been made by pool handlers, pool handlers would be compelled to use more of their milk for manufacturing purposes (Class III), thus reducing the uniform blend price to the producers. The effectiveness of the regulatory scheme would be greatly impaired and its purposes frustrated.

[11] For detailed explanations as to the severe adverse effects which leaving nonpool handlers completely unregulated would have on the regulatory scheme, see, *e.g.*, 18 F.R. 8444–8448; 22 F.R. 4179, 4207–4208; R. 752a–755a.

Petitioners do not appear to deny the need for some form of partial regulation of nonpool handlers.[12] In devising the particular form of that regulation, in turn, the Secretary necessarily has wide discretion. "A variety of plans * * * may well conform to the statutory standards. But the choice among permissive plans is necessarily the Secretary's; he is the agency entrusted by Congress to make the choice." *Secretary of Agriculture* v. *Central Roig Co.*, 338 U.S. 604, 614; *Stark* v. *Wickard*, 321 U.S. 288, 310; *Mitchell* v. *Budd*, 350 U.S. 473, 480; *Queensboro Farms Products* v. *Wickard*, 137 F. 2d 969, 977 (C.A. 2). The record shows plainly that the Secretary gave careful consideration to the various proposals at the rule-making hearings, and selected the present provisions as the most fair and feasible alternative (18 F.R. 8449–8450; 22 F.R. 4207–4208; R. 752a–755a). Given the apparent admission that partial regulation of some

[12] The alternative—full regulation of the handlers who make only a small portion of their sales in the marketing area—has been held permissible. *Titusville Dairy Products Co.* v. *Brannan*, 176 F. 2d 332 (C.A. 3), certiorari denied, 338 U.S. 905. However, such full regulation of nonpool handlers is likely to burden them unduly and place them at a severe competitive disadvantage with regard to other nonpool handlers in the sale of milk in unregulated areas. 22 F.R. 4207–4208. See also *Lawson Milk Co.* v. *Benson*, 187 F. Supp. 66, 72 (N.D. Ohio).

The petitioners here, as we have noted (p. 8, *supra*), have elected to be subjected to partial regulation, in the form of the compensatory payments, rather than to full regulation. Accordingly, should the Court grant certiorari here, the government would urge as one of its contentions that petitioners are, to the extent that they have claimed the benefits of partial regulation, estopped from contending that its incidents are invalid.

sort is needed, no valid objection can be made to the provisions actually adopted.

Petitioners contend that the formula for computing compensatory payments is unjustified and that it should be based on the actual cost of their milk to nonpool handlers (Pet. 16–20). That alternative, however, was expressly considered by the Secretary and was found, for reasons stated at length in his findings, not to be a suitable or adequate measure. 18 F.R. 8449. A basic objection to such a formula is that it would enable nonpool plants—which, in the milkshed supplying the New York-New Jersey market, operate side by side with pool plants—to outbid pool plants in buying milk. That effect is most evident in the case of a handler who pays his farmers on the basis of an individual handler pool (as do handlers, like Lehigh, subject to the Philadelphia marketing order)—*i.e.*, a blend price based on the particular handler's own utilization. Such a handler could account to his own farmers at the full Class I price for any fluid milk sold in the marketing area and thereby avoid making compensatory payments. By availing himself of the New York-New Jersey market to increase his percentage of fluid milk sales above the average of the marketwide pool, he could thus increase the payments to his farmers (based on his own uses) above the uniform blend price paid producers supplying pool plants (based on marketwide pool utilization).

The same would be true, though to lesser extent, of a handler who is unregulated and needs to pay his farmers simply the going market price, which would

normally be, in the New York-New Jersey milkshed, the New York blend price. Since such a handler, under petitioners' formula, would have to make a compensatory payment for the excess of the Class I price over his actual cost, the net utilization value of fluid milk sold in the marketing area would be only the New York blend price (the amount paid his farmers) rather than the full Class I value. By using the New York-New Jersey market to dispose of his otherwise surplus milk, however, he could still increase the utilization value of that milk from the Class III price to the blend price. Combined with his Class I sales outside the marketing area, that would give him an overall utilization value greater than the marketwide pool average and thus enable him to pay more to his farmers than the New York blend price. In turn, moreover, any increase in the price paid his farmers would be partially absorbed (*i.e.*, as to the fluid milk sold in the marketing area) by a corresponding reduction in the required compensatory payment.

The only compensatory payment that can avoid those effects under the conditions prevailing in the New York-New Jersey marketing area [13] is one measured

[13] Under other conditions, of course, different provisions might suffice to prevent nonpool handlers from having an undue competitive advantage. For example, where, in less complex milksheds, pool and nonpool handlers are geographically separated and are not in competition for farmers, the ability of nonpool handlers to pay their farmers more than can pool handlers may be less significant. Because of differences of that kind, a particular provision—*e.g.*, permitting nonpool handlers to account to their farmers on an individual pool basis and account to the marketwide pool only for any difference—may be appropriate for some areas but not for others. See *e.g.*, the order for upstate Michigan, 7 C.F.R. Part 916; § 916.84.

by the full difference between the Class III and Class I prices. That difference, it may be noted, is exactly the additional amount for which a fully-regulated pool handler must account to the Producer Settlement Fund whenever he shifts milk from a Class III use to a Class I use. It is largely that aspect of the order—the handler's liability to the fund is always greater by the Class III-Class I differential when he sells milk for Class I uses than when he sells it for Class III uses—that stabilizes the market and prevents destructive competition for the Class I market. Unless the non-pool handler is faced with the same cost *differential* in choosing between Class III sales and Class I sales in the marketing area, the incentive is present for him to undercut the market, if necessary, in order to convert his otherwise Class III sales into Class I sales. The important thing is to assure, not that the actual costs are the same, but that the cost differential dependent upon the class of sale is the same.

Since the compensatory payment provisions in question are thus essential to the effective operation of the entire regulatory scheme, the provisions are, as the court below found (Pet. 41), authorized by Section 8c(7)(D) of the Act, 7 U.S.C. 608c(7)(D) (App. 29) as "[i]ncidental to * * * and necessary to effectuate the other provisions" of the order. See also *Lawson Milk Co.* v. *Benson,* 187 F. Supp. 66, 72–73 (N.D. Ohio).

Contrary to petitioners' contentions (Pet. 10–12), this Court's decisions in *Brannan* v. *Stark,* 342 U.S. 451, and *United States* v. *Rock Royal Co-op.,* 307 U.S. 533, do not call for a different conclusion. In

Brannan v. *Stark, supra,* the Court held that the Act did not authorize provisions permitting deductions from the Producer Settlement Fund for payments to producers' cooperatives. The Court found that such deductions were not justified by the record,[14] and pointed out further that Congress had expressly dealt with the problem of deductions in Section 8c(5). In contrast, the compensatory payments in issue here are, as we have shown, justified by the record. Moreover, the payments represent a form of partial regulation not within the purview of the basic authorizing provisions of Section 8c(5), yet obviously both "incidental" and "necessary" to the effectiveness of the basic scheme within the contemplation of Section 8c (7)(D). The decision in *United States* v. *Rock Royal Co-op.,* 307 U.S. at 575–576, in which this Court stated that, "[w]hile considerable flexibility is provided by § 8c(7)(D), it gives opportunity only to include provisions auxiliary to those definitely specified," similarly gives no support to petitioners in the case at bar.

(b) The provisions for compensatory payments are in no way inconsistent with or violative of Section 8c(5)(A) of the Act, 7 U.S.C. 608c(5)(A) (App. 27). Petitioners' argument to the contrary is predicated on the section's requirement that an order fixing "minimum prices", for each use classification, "for milk purchased from producers or associations of producers" make such prices "uniform as to all handlers." In reliance on *Kass* v. *Brannan,* 196 F.

[14] See, in this connection, *Grant* v. *Benson,* 229 F. 2d 765 (C.A. D.C.), certiorari denied, 350 U.S. 1015.

2d 791 (C.A. 2), certiorari denied, 344 U.S. 891, petitioners urge that this requirement has application to both pool and nonpool handlers, and by guaranteeing the uniformity of minimum class prices, prohibits "a provision requiring nonpool handlers to pay more for milk of the same use than pool handlers" (Pet. 7).

Petitioners' interpretation of Section 8c(5)(A) must fail for several reasons. In the first place, as stressed by the court below (Pet. 36–37), petitioners and the Second Circuit in the *Kass* case have erred in reading the uniformity requirements of the minimum class-price provision of Section 8c(5)(A) as designed to equalize the actual costs of milk to all handlers distributing milk in the marketing area. The Act makes no reference to or provision for equality of costs among handlers. Its "immediate object * * * is to fix minimum prices for the sale of milk by producers to handlers." *Stark* v. *Wickard,* 321 U.S. 288, 291. As this Court has pointed out, the minimum price provisions of the Act, promulgated for the benefit of producers, do not forbid handlers to pay prices above the minimum price (*ibid.*). Since pool handlers' initial costs may thus be disparate, and yet are in no way relevant in determining their accountability to the Producer Settlement Fund, it becomes plain that the scheme does not even seek to equalize the actual costs of fully regulated handlers. There is thus no warrant for reading Section 8(c)(5)(A) as assuring uniformity of handler outlays.

It must also be stressed that the *Kass* decision's interpretation of Section 8c(5)(A) as requiring that

compensatory payments be measured with reference to the handlers' actual costs necessarily defeats the purposes of the statutory scheme. As we have previously pointed out, *supra*, pp. 15–17, and as the court below emphasized (Pet. 37–38), it would be wholly ineffective to base nonpool handlers' obligations on their actual costs. See also Judge Learned Hand, dissenting, in *Kass* v. *Brannan*, 196 F. 2d 791, 799. The remaining alternatives would be either to exempt nonpool handlers from any regulation, with a resulting severe adverse impact on the entire scheme, or to regulate them fully to their serious prejudice. Such an interpretation of the statute, rendering it unworkable, should be rejected. Cf. *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 392.

In any event, the court below was correct in concluding that the provisions of Section 8c(5)(A) simply have no application to nonpool handlers or their obligations (Pet. 38, 40). The requirement in Section 8c(5)(A) is that the minimum prices "for milk purchased from producers or associations of producers" be uniform. In Order No. 27, the Secretary has defined the word "producer" as referring to "any dairy farmer whose milk is delivered direct from farm to a pool plant." 7 C.F.R. 927.6. Since, pursuant to this definition, nonpool handlers do not purchase their milk from "producers", the uniformity provision of Section 8c(5)(A) is by its terms inapplicable to them. Furthermore, as it is only with respect to the milk of "producers" that minimum prices must be paid under the order, non-

pool handlers have no obligation to pay minimum prices. Accordingly, Section 8c(5)(A), in requiring that minimum prices be uniform, can have no applicability to nonpool handlers.[18]

Petitioners, however, relying again on the *Kass* case, urge that the Secretary has no power so to limit the definition of "producer" and that the term properly includes dairy farmers who sell to nonpool plants as well as those who sell to pool plants (Pet. 13–15). As the court of appeals pointed out (Pet. 38–39, fn. 6), however, that argument proves too much, for if petitioners must be treated as "handlers" purchasing milk from "producers" for purposes of Section 8c (5)(A), they must by the same token be so treated for purposes of the marketwide pooling provisions authorized by Sections 8c(5)(B)(ii) and (C). In short, if petitioners are right, the system of partial regulation they have been allowed to elect (applicable only to milk disposed of in the marketing area) in preference to full regulation (requiring pooling of all

[18] The Secretary's position that Section 8c(5)(A) does not apply to nonpool handlers was also recently accepted by the United States District Court for the Northern District of Ohio, which, like the court below, rejected the *Kass* decision in holding compensatory payment provisions authorized by the Act. *Lawson Milk Co.* v. *Benson*, 187 F. Supp. 66 (N.D. Ohio). That decision is now pending on appeal to the Court of Appeals for the Sixth Circuit. On April 11, 1961, the Sixth Circuit entered an order staying the proceedings in the appeal "pending the outcome of the case of *United States* v. *Lehigh Valley Cooperative Farmers, Inc., et al.*, Nos. 13289, 13290 and 13291 (C.A. 3) which we are advised will be taken to the Supreme Court on petition for certiorari."

milk handled by them) is unauthorized and they must be subjected to full regulation.[16]

The limitation of the pooling provisions to handlers and producers closely associated with the market—accomplished by the definitions of "pool plants" and "producers"—is in fact, however, fully authorized. It is true, as petitioners claim (Pet. 14), that Section 8c (5) itself does not in terms distinguish between various classes of handlers and producers. But Section 8c (11)(A) expressly directs that marketing orders be limited in application to *regional* production or marketing areas. The authorization of regional orders requires, in turn, that a line be drawn between those producers and handlers subject to the pooling provisions of a particular order and those who are not, and it is that function that is served by the Secretary's definitions of "producers" and "pool plants" under Order No. 27. In substance, they define the "area" in which the pooling provisions of that order are applicable, though doing so in terms of functional rather than geographical relationships to the market. That is plainly a permissible method of defining the scope of a "regional" order, and we do not understand petitioners to challenge the provisions permitting handlers who do only a small part of their business in the mar-

[16] Section 8c(5)(A) itself, moreover, requires the prescribed minimum prices to be paid for *all* milk delivered by producers to the handler, and it is that requirement that must be "uniform." Hence, even if paragraph (A) alone were applicable, it would mean that petitioners are subject to the minimum pricing provisions on all their milk, and not just that sold in the marketing area.

keting area to elect not to be subject to the pooling provisions of the order.

Once it is conceded, however, that the Secretary may exempt petitioners from the pooling requirements of the order, it necessarily follows that Section 8c(5)(A) is inapplicable to them. Paragraphs (A), (B), and (C) are interrelated parts of the statutory scheme, and together provide the authority for the establishment of milk pools: (A) provides for the payment by handlers of the prescribed minimum prices for their actual utilization of milk (*i.e.*, the "use" price): (B) provides for the payment to producers of a uniform price regardless of use (*i.e.*, the "blend" price); and (C) authorizes the establishment of the equalization fund needed to effect the accountings required by (A) and (B) (*i.e.*, the Producer Settlement Fund). Since the very purpose of those paragraphs is the authorization of pooling provisions, they are by definition inapplicable to any handlers properly excepted from the pooling requirements. The scope of the "uniformity" requirement of subsection (A) on which petitioners rely is necessarily the same; it simply requires that the pooling provisions themselves be of equal application—*i.e.*, that the minimum prices to handlers for *pooled* milk be uniform. Since petitioners are, by their own election, not subject to the pooling provisions, that provision can have no application to them.

In the end, Section 8c(5)(A) is neither the source of the authority for, nor in any way concerned with the terms of, the incidental regulation of handlers who are not subject to the pooling requirements of the order. The source of that regulation is instead Sec-

tion 8c(7)(D), which authorizes provisions "[i]ncidental to, and not inconsistent with, [the provisions specified in subsection 5] * * * and necessary to effectuate" their purpose. The compensatory payment provisions, being applicable only to handlers who are not subject to the pooling provisions specified in Section 8c(5), cannot be "inconsistent" with those provisions and, being necessary to prevent the purposes of the pooling provisions from being undermined by the unregulated competition of nonpool handlers, are "necessary to effectuate" the pooling provisions. Hence, as the court below concluded, they are fully authorized by Section 8c(7)(D).[17]

[17] Petitioners argue further that the effect of the compensatory payment provisions is to exclude nonpool handlers from the marketing area, in violation of Section 8c(5)(G) of the Act, 7 U.S.C. 608c(5)(G) (App. 28) (Pet. 20). That argument was not asserted in the administrative proceedings, and is therefore not presented here. *United States* v. *Ruzicka*, 329 U.S. 287, 292–294; *La Verne Co-op. Citrus Ass'n* v. *United States*, 143 F. 2d 415, 418 (C.A. 9); *Panno* v. *United States*, 203 F. 2d 504, 508–509 (C.A. 9). It is, in any event, without merit. As Judge Learned Hand remarked, rejecting precisely this contention in his dissenting opinion in the *Kass* case (the majority of the court did not reach this issue), "The plaintiff's argument * * * must be, that § 8c(5)(G) forbids any provision in an order, however necessary to protect a 'pool,' if in operation it will result in limiting the introduction of 'products' into 'the marketing area.' I cannot believe that, when Congress decided to regulate the industry in order to assure a 'uniform price' to producers, it meant by § 8c(5)(G) to forbid all protective measures, which should result in lessening the amount of 'products' which without such measures would have entered the 'marketing area' in question." 196 F. 2d 791, 800. See also *Bailey Farm Dairy Co.* v. *Anderson*, 157 F. 2d 87, 96–97 (C.A. 8), certiorari denied, 329 U.S. 788. Moreover, the compensatory payment

CONCLUSION

Because of the existing conflict between the decision below and that of the Second Circuit in *Kass* v. *Brannan*, *supra*, we do not, at this time, oppose the granting of the petition for certiorari. However, as we have already noted, essentially the same issue is again pending before the Second Circuit in *Knudsen Brothers Dairy, Inc.* v. *Freeman*, No. 26,698, in which oral argument was heard on May 4, 1961.[18] Should the Second Circuit in that case overrule its prior decision,

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provisions in question are applicable to nonpool handlers generally, wherever located, and thus have no reference to milk produced in a particular geographical "production area", as contemplated by Section 8c(5)(G).

Finally, petitioners assert that if the compensatory payment provisions are authorized by Section 8c(7)(D) of the Act, that section illegally delegates legislative power in violation of Article I, Section I, of the Constitution (Pet. 20–21). That contention was not raised by petitioners at any stage of the proceedings below, and thus is not properly presented here. However, this argument too is patently unsound. In *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 575–576, this Court specifically ruled that, while Section 8c(7)(D) provides considerable flexibility, it does not delegate legislative power unconstitutionally because "it gives opportunity only to include provisions auxiliary to those definitely specified."

[18] The *Knudsen Brothers* case is an action for review of the Secretary's decision holding the compensatory payment provisions of the Springfield, Massachusetts, marketing order (7 C.F.R. 996.65(b)) valid as applied to the plaintiff handler. The district court rejected the handler's contentions that the compensatory payment provisions were, by their terms, inapplicable to transactions between the handler and a military base. However, on the basis of the *Kass* case, it ruled that the provisions were invalid because violative of the "uniformity" requirement of Section 8c(5)(A) of the Act. *Knudsen Brothers Dairy, Inc.* v. *Benson*, D. Conn., Civil No. 8145, July 19, 1960. The same questions have been presented on the Secretary's appeal to the Second Circuit.

as the government has urged, the issue will have been correctly resolved by both circuits and there will remain no need for review by this Court. We suggest, therefore, that the Court defer action on the present petition, until the beginning of the October 1961 Term, pending the decision of the Second Circuit in *Knudsen Brothers Dairy, Inc.* v. *Freeman.*

Respectfully submitted.

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APPENDIX

The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601, *et seq.*, provides, in pertinent part:

§ 608c. Orders regulating handling of commodity.

* * * * *

(5) *Milk and its products; terms and conditions of orders.*

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during

a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk, produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

* * * * *

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product

thereof produced in any production area in the United States.

* * * * *

(7) *Terms common to all orders.*

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

* * * * *

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)–(7) of this section and necessary to effectuate the other provisions of such order.

* * * * *

(11) *Regional application.*

(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of sections 601–604, 607, 608, 608a, 608b, 608c, 608d, 608e–1, 608f–612, 613, 614–619, 620, 623, and 624 of this title.

* * * * *

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

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